



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO Box 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
*Governor*

KIM GUADAGNO  
*Lt. Governor*

CHARLES A. RICHMAN  
*Commissioner*

**FINAL DECISION**

**May 24, 2016 Government Records Council Meeting**

Jeff Carter  
Complainant

Complaint No. 2011-259

v.

Franklin Fire District No. 2 (Somerset)  
Custodian of Record

At the May 24, 2016 public meeting, the Government Records Council (“Council”) considered the May 17, 2016 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that it dismisses the complaint. The Complainant (via Counsel) withdrew his complaint in a letter to the Honorable John S. Kennedy, Administrative Law Judge, dated May 9, 2016, because the parties settled the matter. Therefore, no further adjudication is required.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the  
Government Records Council  
On The 24<sup>th</sup> Day of May, 2016

Robin Berg Tabakin, Esq., Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: May 27, 2016**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
May 24, 2016 Council Meeting**

**Jeff Carter<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-259**

v.

**Franklin Fire District No. 2 (Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of all meeting minutes for the following dates:

1. May 11, 2011.
2. May 18, 2011.
3. June 8, 2011.
4. June 15, 2011.
5. July 11, 2011.
6. July 13, 2011.
7. July 20, 2011.

**Custodian of Record:** William Kleiber

**Request Received by Custodian:** July 22, 2011

**Response Made by Custodian:** None

**GRC Complaint Received:** August 4, 2011

**Background**

January 29, 2013 Council Meeting:

At its January 29, 2013 public meeting, the Council considered the January 22, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian failed to fully comply with the Council's December 18, 2012 Order because although Ms. Accardi provided the responsive records to the Complainant within the prescribed time frame, the Custodian failed to submit certified confirmation of compliance.

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<sup>1</sup> Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ).

<sup>2</sup> Represented by Eric M. Perkins, Esq. (Skillman, NJ).

2. The Custodian's failure to respond to the Complainant's OPRA request resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), and the Custodian failed to fully comply with the Council's Order by failing to submit certified confirmation of compliance as directed by said Order. However, Ms. Accardi did provide all records to the Complainant on December 27, 2012 via e-mail to include two (2) sets of minutes that were not disclosable at the time of the Complainant's OPRA request. Further, Ms. Accardi confirmed that no minutes dated May 11, 2011 existed because the Franklin Fire District No. 2 Board did not meet. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, it is concluded that the Custodian's actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
  
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Id. at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, Ms. Accardi specified in her letter to the Complainant, dated December 27, 2012, that four (4) of the responsive minutes were provided to the Complainant after the filing of this complaint and the Custodian presented no evidence in the record to indicate that this complaint was not the catalyst for said disclosure. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, and Mason. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Dep't of Corr., 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Twp. of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances . . . justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

#### Procedural History:

On February 1, 2013, the Council distributed its Interim Order to all parties. On May 6, 2013, the GRC transmitted this complaint to the Office of Administrative Law ("OAL").

On May 9, 2016, the Complainant's Counsel sent a letter to the Honorable John S. Kennedy, Administrative Law Judge, withdrawing the complaint because the parties settled all issues.

### **Analysis**

No analysis required.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends that the Council dismiss the complaint. The Complainant (via Counsel) withdrew his complaint in a letter to the Honorable John S. Kennedy, Administrative Law Judge, dated May 9, 2016, because the parties settled the matter. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso  
Communications Specialist/Resource Manager

May 17, 2016



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

January 29, 2013 Government Records Council Meeting

Jeff Carter  
Complainant

Complaint No. 2011-259

v.

Franklin Fire District No. 2 (Somerset)  
Custodian of Record

At the January 29, 2013 public meeting, the Government Records Council (“Council”) considered the January 22, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian failed to fully comply with the Council’s December 18, 2012 Order because although Ms. Accardi provided the responsive records to the Complainant within the prescribed time frame, the Custodian failed to submit certified confirmation of compliance.
2. The Custodian’s failure to respond to the Complainant’s OPRA request resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) and the Custodian failed to fully comply with the Council’s Order by failing to submit certified confirmation of compliance as directed by said Order. However, Ms. Accardi did provide all records sought to the Complainant on December 27, 2012 via e-mail to include two (2) sets of minutes that were not disclosable at the time of the Complainant’s OPRA request. Further, Ms. Accardi confirmed that no minutes dated May 11, 2011 existed because the Franklin Fire District No. 1 Board did not meet. Additionally, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, Ms. Accardi specified in her letter to the Complainant dated December 27, 2012 that four (4) of the responsive minutes were provided to the Complainant after the filing of this



complaint and the Custodian presented no evidence in the record to indicate that this complaint was not the catalyst for said disclosure. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Interim Order Rendered by the  
Government Records Council  
On The 29<sup>th</sup> Day of January, 2013

Robin Berg Tabakin, Esq., Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: February 1, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
January 29, 2013 Council Meeting**

**Jeff Carter<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-259**

v.

**Franklin Fire District No. 2 (Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of all meeting minutes for the following dates:

1. May 11, 2011.
2. May 18, 2011.
3. June 8, 2011.
4. June 15, 2011.
5. July 11, 2011.
6. July 13, 2011.
7. July 20, 2011.

**Request Made:** July 22, 2011

**Response Made:** None

**Custodian:** William Kleiber

**GRC Complaint Filed:** August 4, 2011<sup>3</sup>

**Background**

**December 18, 2012**

Government Records Council's ("Council") Interim Order. At its December 18, 2012 public meeting, the Council considered the October 23, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to

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<sup>1</sup> Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ).

<sup>2</sup> Represented by Eric M. Perkins, Esq. (Skillman, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. The Custodian failed to bear his burden of proving a lawful denial of access to the responsive records. N.J.S.A. 47:1A-6. Thus, the Custodian must provide the requested meeting minutes for the dates identified in the Complainant's OPRA request to the Complainant via the preferred method of delivery, which is e-mail. However, if minutes for a particular date do not exist or were not approved by the Franklin Fire District No. 2 Board at the time of the Complainant's OPRA request, the Custodian must certify to this fact. *See Parave-Fogg v. Lower Alloways Creek Township*, GRC Complaint No. 2006-51 (August 2006).
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>4</sup> to the Executive Director.<sup>5</sup>**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

#### **December 19, 2012**

Council's Interim Order ("Order") distributed to the parties.

#### **December 27, 2012**

E-mail from Ms. Sandy Accardi ("Ms. Accardi"), Franklin Fire District No. 2 ("FFD") Secretary, to the Complainant.<sup>6</sup> Ms. Accardi states that in response to the Council's Order, attached are copies of work session minutes dated June 8, 2011 and July 13, 2011. Ms. Accardi states that these minutes were transcribed from audio recordings and approved by the FFD Board at its December 19, 2012 meeting.

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<sup>4</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>5</sup> Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

<sup>6</sup> Ms. Accardi copied the Complainant's Counsel, GRC and Custodian on this e-mail.



Ms. Accardi states that she previously provided to the Complainant minutes dated May 18, 2011 and June 15, 2011 on August 5, 2011. Ms. Accardi further states that she previously provided to the Complainant minutes dated July 11, 2011 and July 20, 2011 on November 10, 2011. Ms. Accardi states that she has attached copies of these records. Ms. Accardi states that no minutes dated May 11, 2011 exist because no meeting was held on this date.

### Analysis

#### **Whether the Custodian complied with the Council's December 18, 2012 Interim Order?**

At its December 18, 2012 meeting, the Council ordered the Custodian to:

“...provide the requested meeting minutes for the dates identified in the Complainant's OPRA request to the Complainant via the preferred method of delivery, which is e-mail. However, if minutes for a particular date do not exist or were not approved by the [FFD] Board at the time of the Complainant's OPRA request, the Custodian must certify to this fact ... **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**” (Footnotes omitted.)

The Council disseminated its Order to the parties on December 19, 2012. Thus, the Custodian's response was due by close of business on December 27, 2012. On December 27, 2012, Ms. Accardi simultaneously e-mailed all parties a letter to the Complainant and responsive records. In said letter, Ms. Accardi noted that two (2) sets of minutes were not approved by the FFD Board until December 19, 2012. Additionally, Ms. Accardi provided four (4) sets of minutes and stated that no minutes dated May 11, 2011 existed.

However, absent from this e-mail was a legal certification from the Custodian as was specifically required by the Council's Order. Thus, the Custodian did not fully comply with the Council's Order.

Therefore, the Custodian failed to fully comply with the Council's December 18, 2012 Order because although Ms. Accardi provided the responsive records to the Complainant within the prescribed time frame, the Custodian failed to submit certified confirmation of compliance.

The GRC finally notes that the FFD was under no obligation to provide any minutes that were not approved prior to the date of the Complainant's OPRA request, which was July 22, 2011. *See Parave-Fogg, supra* (holding that draft meeting minutes are exempt from disclosure as “inter-agency or intra agency advisory, consultative or deliberative” material pursuant to N.J.S.A. 47:1A-1.1).

**Whether the Custodian’s actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

OPRA states that:

“[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11(a).

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Felder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996).

The Custodian’s failure to respond to the Complainant’s OPRA request resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) and the Custodian failed to fully comply with the Council’s Order by failing to submit certified confirmation of compliance as directed by said Order. However, Ms. Accardi did provide all records sought to the Complainant on December 27, 2012 via e-mail to include two (2) sets of minutes that were not disclosable at the time of the Complainant’s OPRA request. Further, Ms. Accardi confirmed that no minutes dated May 11, 2011 existed because the FFD Board did not meet. Additionally, the evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

**Whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees?**

OPRA provides that:

“[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or
- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a “prevailing party” if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. *Id.* at 432. Additionally, the Court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, supra, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties.” *Id.* at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney's fees. *Id.* at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason, supra, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing Teeters, supra*, 387 N.J. Super. at 429; *see, e.g., Baer v. Klagholz*, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied*, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

“OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that ‘[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.’ N.J.S.A. 47:1A-6. Under the prior RTKL, ‘[a] plaintiff in whose favor such an order [requiring access to public records] issues ... may be awarded a reasonable attorney's fee not to exceed \$500.00.’ N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.” (Footnote omitted.) Mason at 73-76 (2008).

The Court in Mason, *supra*, at 76, held that “requestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) ‘a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved’; and (2) ‘that the relief ultimately secured by plaintiffs had a basis in law.’ Singer v. State, 95 N.J. 487, 495, *cert denied* (1984).”

In Mason, the plaintiff submitted an OPRA request on February 9, 2004. Hoboken responded on February 20, eight (8) business days later, or one day beyond the statutory limit. *Id.* at 79. As a result, the Court shifted the burden to Hoboken to prove that the plaintiff's lawsuit, filed on March 4, was not the catalyst behind the City's voluntary disclosure. *Id.* Because Hoboken's February 20 response included a copy of a memo dated February 19 -- the seventh business day -- which advised that one of the requested records should be available on February 27 and the other one week later, the Court determined that the plaintiff's lawsuit was not the catalyst for the release of the records and found that she was not entitled to an award of prevailing party attorney fees. *Id.* at 80.

In determining whether the Complainant herein is a prevailing party, the GRC acknowledges that the Custodian's failure to respond in writing in a timely manner resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i). Thus, the burden of proving that this complaint was not the catalyst for providing the responsive records to the Complainant shifts to the Custodian pursuant to Mason, *supra*.

The GRC first notes that the FFD's May 11, 2011, June 8, 2011 and July 13, 2011 minutes do not factor into the determination of prevailing party attorney's fees. Specifically, no May 11, 2011 minutes exist and the June 8, 2011 and July 13, 2011 minutes were not approved by the FFD Board until well after the Complainant submitted his OPRA request and were thus exempt from disclosure at that time.

There is no evidence indicating that the Custodian responded or intended to respond to the Complainant's OPRA request because the Custodian did not submit an SOI. Ms. Accardi stated in her December 27, 2012 letter to the Complainant that four (4) sets of the responsive minutes were previously provided after the filing of this complaint.

However, the Custodian provided no arguments or evidence to prove that this complaint was not the catalyst for disclosure of the responsive records. Thus, the Complainant is a prevailing party entitled to an award of reasonable attorney's fees.

Pursuant to Teeters, supra, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason, supra, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, Ms. Accardi specified in her letter to the Complainant dated December 27, 2012 that four (4) of the responsive minutes were provided to the Complainant after the filing of this complaint and the Custodian presented no evidence in the record to indicate that this complaint was not the catalyst for said disclosure. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian failed to fully comply with the Council's December 18, 2012 Order because although Ms. Accardi provided the responsive records to the Complainant within the prescribed time frame, the Custodian failed to submit certified confirmation of compliance.
2. The Custodian's failure to respond to the Complainant's OPRA request resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i) and the Custodian failed to fully comply with the Council's Order by failing to submit certified confirmation of compliance as directed by said Order. However, Ms. Accardi did provide all records sought to the Complainant on December 27, 2012 via e-mail to include two (2) sets of minutes that were not disclosable at the time of the Complainant's OPRA request. Further, Ms. Accardi confirmed that no minutes dated May 11, 2011 existed because the Franklin Fire District No. 1 Board did not meet. Additionally, the evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's

actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, Ms. Accardi specified in her letter to the Complainant dated December 27, 2012 that four (4) of the responsive minutes were provided to the Complainant after the filing of this complaint and the Custodian presented no evidence in the record to indicate that this complaint was not the catalyst for said disclosure. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney’s fees. Based on the New Jersey Supreme Court’s decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council’s decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of “unusual circumstances ...justify[ing] an upward adjustment of the lodestar[;]” this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

January 22, 2013



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

December 18, 2012 Government Records Council Meeting

Jeff Carter  
Complainant

Complaint No. 2011-259

v.

Franklin Fire District No. 2 (Somerset)  
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council ("Council") considered the October 23, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian failed to bear his burden of proving a lawful denial of access to the responsive records. N.J.S.A. 47:1A-6. Thus, the Custodian must provide the requested meeting minutes for the dates identified in the Complainant's OPRA request to the Complainant via the preferred method of delivery, which is e-mail. However, if minutes for a particular date do not exist or were not approved by the Franklin Fire District No. 2 Board at the time of the Complainant's OPRA request, the Custodian must certify to this fact. See Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006).
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup>**

<sup>1</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>2</sup> Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 18<sup>th</sup> Day of December, 2012

Robin Berg Tabakin, Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: December 19, 2012**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 18, 2012 Council Meeting**

**Jeff Carter<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-259**

v.

**Franklin Fire District No. 2 (Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of all meeting minutes for the following dates:

1. May 11, 2011.
2. May 18, 2011.
3. June 8, 2011.
4. June 15, 2011.
5. July 11, 2011.
6. July 13, 2011.
7. July 20, 2011.

**Request Made:** July 22, 2011

**Response Made:** None

**Custodian:** William Kleiber

**GRC Complaint Filed:** August 4, 2011<sup>3</sup>

**Background**

**July 22, 2011**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in a letter referencing OPRA. The Complainant indicates that the preferred method of delivery is e-mail or facsimile if the records are not available electronically.

**August 4, 2011**

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching the Complainant's OPRA request dated July 22, 2011.

The Complainant states that he submitted an OPRA request to Franklin Fire District No. 2 ("FFD") via e-mail and facsimile on July 22, 2011. The Complainant states that as of August 3, 2011, the Custodian has failed to respond to said OPRA request.

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<sup>1</sup> Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ).

<sup>2</sup> Represented by Eric M. Perkins, Esq. (Skillman, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

The Complainant contends that this request is one of several OPRA requests to which the Custodian has failed to respond. The Complainant contends that the facts indicate that the Custodian has created a pattern of knowingly and willfully failing to respond to the Complainant's OPRA requests. The Complainant thus requests the following:

1. A determination that the Custodian has violated OPRA by failing to respond within the statutorily mandated time frame.
2. A determination ordering disclosure of all responsive records.
3. A determination that the Custodian knowingly and willfully violated OPRA.

The Complainant does not agree to mediate this complaint.

### **August 5, 2011**

Request for the Statement of Information ("SOI") sent to the Custodian.

### **August 18, 2011**

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for an SOI on August 5, 2011 and to date has not received a response. Further, the GRC states that if the SOI is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.<sup>4</sup>

## **Analysis**

### **Whether the Custodian timely responded to the Complainant's OPRA request?**

OPRA provides that:

"[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ..." N.J.S.A. 47:1A-5.g.

Further, OPRA provides that:

"[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ..." (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i.

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<sup>4</sup> The Custodian did not respond to the GRC's request for an SOI.

As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.<sup>5</sup> Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

The Complainant submitted an OPRA request to the FFD on July 22, 2011. There is no evidence in the record indicating when the Custodian received the Complainant's OPRA request because the Custodian did not submit an SOI. Further, there is no evidence indicating that the Custodian responded to the Complainant's OPRA request.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra.

### **Whether the Custodian unlawfully denied access to the requested meeting minutes?**

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

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<sup>5</sup> It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The Complainant’s OPRA request sought meeting minutes for several dates in May, June and July. The Custodian did not respond and further did not submit an SOI setting forth the lawful basis for said “deemed” denial.

OPRA requires disclosure of non-exempt government records. N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-5.i. The Custodian herein never asserted that the responsive records were exempt from disclosure under OPRA because no meeting was held on a particular dates provided for in the OPRA request or because said minutes were not approved by the FFD Board at the time of receipt of the Complainant’s OPRA request. *See Parave-Fogg v. Lower Alloways Creek Township*, GRC Complaint No. 2006-51 (August 2006)(holding that unapproved, draft executive session meeting minutes constitute “inter-agency or intra-agency advisory, consultative, or deliberative material” and thus are not government records subject to disclosure pursuant to N.J.S.A. 47:1A-1.1). Instead, the Custodian simply did not respond to either the Complainant’s OPRA request or the GRC’s request to submit an SOI.

Therefore, the Custodian failed to bear his burden of proving a lawful denial of access to the responsive records. N.J.S.A. 47:1A-6. Thus, the Custodian must provide the requested meeting minutes for the dates identified in the Complainant’s OPRA request to the Complainant via the preferred method of delivery, which is e-mail. However, if minutes for a particular date do not exist or were not approved by the FFD Board at the time of the Complainant’s OPRA request, the Custodian must certify to this fact. *See Parave-Fogg, supra*.

**Whether the Custodian’s actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

**Whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees?**

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian failed to bear his burden of proving a lawful denial of access to the responsive records. N.J.S.A. 47:1A-6. Thus, the Custodian must provide the requested meeting minutes for the dates identified in the Complainant's OPRA request to the Complainant via the preferred method of delivery, which is e-mail. However, if minutes for a particular date do not exist or were not approved by the Franklin Fire District No. 2 Board at the time of the Complainant's OPRA request, the Custodian must certify to this fact. *See Parave-Fogg v. Lower Alloways Creek Township*, GRC Complaint No. 2006-51 (August 2006).
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>6</sup> to the Executive Director.<sup>7</sup>**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso  
Senior Case Manager

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<sup>6</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>7</sup> Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

October 23, 2012<sup>8</sup>

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<sup>8</sup> This complaint was prepared and scheduled for adjudication at the Council's October 30, 2012 meeting; however, said meeting was cancelled due to Hurricane Sandy. Additionally, the Council's November 27, 2012 meeting was cancelled due to lack of quorum.